

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

JOHN ROBISON	:	APPEAL NO. C-090807
	:	TRIAL NO. A0701574
and	:	
ANGIE ROBISON,	:	<i>JUDGMENT ENTRY.</i>
Plaintiffs-Appellants,	:	
vs.	:	
WINTER ENTERPRISES, LLC,	:	
d.b.a. THE FUN FACTORY,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiffs-appellants, John Robison and Angie Robison, appeal the summary judgment entered by the Hamilton County Court of Common Pleas in favor of defendant-appellee, Winter Enterprises, LLC, d.b.a. The Fun Factory, in a personal-injury action.

John Robison and members of his family went to The Fun Factory roller-skating rink for a birthday party. Robison got a pair of skates that The Fun Factory offered to patrons. He testified in his deposition that the laces of the skates had not

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

been long enough to reach the top of the skates but that he had nonetheless chosen to use them.

After skating for a time, Robison went to the locker area of the premises to retrieve his shoes. As he approached the lockers, one of his skates became entangled in a portion of the floor where the carpet had peeled away from the flooring underneath. Robison fell and broke his ankle.

In his deposition, Robison testified that, had he looked down, he would have seen the defect. When asked if The Fun Factory personnel had been aware of the defect, Robison answered, “If they wasn’t, they was blind.”

The Robisons sued The Fun Factory, with Angie Robison asserting a claim for loss of consortium. The Fun Factory did not respond to the complaint within the prescribed time, and the Robisons moved for a default judgment. The trial court denied the motion and granted The Fun Factory leave to file an answer instantner. After discovery, the court granted summary judgment in favor of The Fun Factory.

In their first assignment of error, the Robisons now argue that the trial court erred in denying their motion for default judgment and in granting The Fun Factory leave to file an answer.

A trial court's decision to allow a party to file a late answer under Civ.R. 6(B)(2) will not be reversed absent an abuse of discretion.² Default judgments are not favored in the law; cases should be decided on their merits rather than on technical grounds.³

In this case, the trial court did not abuse its discretion. The Fun Factory filed its motion for leave to answer a mere six days after the deadline. It explained that it

² *State ex rel. Lindenschmidt v. Bd. of Commrs. of Butler Cty.*, 72 Ohio St.3d 464, 465, 1995-Ohio-49, 650 N.E.2d 1343.

had given the case to its insurer, and that the handling of the case had simply been overlooked as a result of the transfer. Under these circumstances, the trial court could have reasonably concluded that The Fun Factory had not neglected the case, even though the insurer had been remiss. Accordingly, we overrule the first assignment of error.

In their second and final assignment of error, the Robisons argue that the trial court erred in granting The Fun Factory's motion for summary judgment.

Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.⁴ This court reviews the granting of summary judgment de novo.⁵

To recover on a claim of negligence, the plaintiff must prove that the defendant owed the plaintiff a duty, that the defendant breached that duty, and that the breach of the duty proximately caused the plaintiff's injury.⁶

A property owner has no duty to warn an invitee of a hazard that is open and obvious.⁷ Whether an owner owed an invitee a duty of care may be decided as a matter of law and is therefore a proper basis for summary judgment.⁸

In this case, the trial court properly granted summary judgment. John Robison's own testimony established that the alleged defect had been open and

³ See, e.g., *Heard v. Dubose*, 1st Dist. No. C-060265, 2007-Ohio-551, ¶20.

⁴ See *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.

⁵ *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, ¶6.

⁶ *Wellman v. E. Ohio Gas Co.* (1953), 160 Ohio St. 103, 113 N.E.2d 629, paragraph three of the syllabus.

⁷ *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, at ¶14.

obvious, and he failed to demonstrate that any attendant circumstances had prevented him from observing and avoiding the hazard.

But the Robisons also argue that the condition of John Robison's skates, while not a cause of the fall, exacerbated the injuries that he had sustained. Specifically, they argue that, because the laces of the skate did not properly secure John Robison's ankle, his ankle was more severely injured than it would have been had the skate not been defective.

We find no merit in this argument. The contention that the skate aggravated the injury is based solely upon John Robison's own speculation. There was no expert testimony or other competent evidence to establish that the condition of the skate had contributed to the fall or that it had increased the severity of the injury. Accordingly, we overrule the second assignment of error and affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 28, 2010

per order of the Court _____.
Presiding Judge

⁸ Id. at ¶16.